IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **23.02.2017**

CORAM

THE HON'BLE MRS.JUSTICE **PUSHPA SATHYANARAYANA**

CRP PD No.303 of 2015
and
M.P.No.1 of 2015

S.Selvan .. Petitioner

vs

1. Home Finders Estate Management
and Welfare Society-Ramapuram
Home Finders Estate
No.75/2, Valluvar Salai
Ramapuram, Chennai 600 089.

2. Home Finders Housing Limited
rep.by its Chairman and Managing
Director, K.S.Ramalingam
having registered office at
Race View Tower
No.71, Mount Road, Guindy
Chennai 600 032. .. Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India against the order dated 12.09.2014 passed by the learned VI Assistant Judge, City Civil Court, Chennai in I.A.No.17892 of 2013 in O.S.No.3986 of 2009.

For Petitioner : Mr.J.Saravanavel

For Respondents : Mr.Ashok Menon for R1
Mr.K.V.Anathakrishnan
for R2

ORDER

The first defendant is the revision petitioner. Challenging the order passed by the Court below in allowing the application filed by the first respondent/plaintiff under Order 18 Rule 17 Code of Civil Procedure to re-open the evidence of the petitioner/plaintiff, to let in further oral evidence and to mark certain exhibits, the present revision has been preferred.

2. The plaintiff is the Executive Committee Member of the petitioner society and the suit is filed for a declaration declaring that the judgment and decree passed in O.S.No.5677 of 2008 dated 06.04.2009 is invalid, non-est in the eye of law and the same is not binding on the plaintiff. After the evidence in the suit was completed, the plaintiff filed an application before the Court

below praying to send for the publication in Malai Malar dated 05.10.2008 with respect to O.S.No.5677 of 2008 and also the bailiff's report in I.A.No.13677 of 2008. The trial court also directed the plaintiff to obtain the certified copies of the said documents. The certified copies were thereafter obtained and filed along with a memo, however, in order to mark the documents to be taken on record, the above application to reopen has been filed by the plaintiff.

3. The said application was resisted by the first defendant/revision petitioner on the ground that the arguments of the suit itself is over and the application is filed at the fag end of the case. According to him, the application has been filed only to drag on the proceedings with a mala fide intention. As the plaintiff had knowledge about the existence of these documents, the same ought to have been filed at the relevant point of time, however, the present application, which has been filed at the belated stage is frivolous and hence, the same has to be dismissed.

4. The Court below, which has been dealing with the suit, had allowed the application on payment of cost of Rs.2,000/-.

5. Aggrieved by the same, the revision has been filed by the first defendant.

6. It is the case of the revision petitioner that the application for re-opening of evidence ought to have been dismissed in view of the decision of the Hon'ble Supreme Court reported in ***(2013)14 SCC 1 [Bagai Construction through its proprietor Lalit Bagai vs. Gupta Building Material Store],*** wherein it is held as follows:

> "14. ..... The High Court taking note of the words "at any stage" occurring in Order XVIII Rule 17 casually set aside the order of the trial Court, allowed those applications and permitted the plaintiff to place on record certain bills and also granted permission to recall PW-1 to prove those bills. Though power under Section 151 can be exercised if ends of justice so warrant and to prevent abuse of process of the court and Court can

> exercise its discretion to permit reopening of evidence or recalling of witness for further examination/cross-examination after evidence led by the parties, in the light of the information as shown in the order of the trial Court, namely, those documents were very well available throughout the trial, we are of the view that even by exercise of Section 151 of CPC, the plaintiff cannot be permitted. "

The said judgment is following yet another judgment of the Hon'ble Apex Court reported in ***(2011) 11 SCC 275 [K.K.Velusamy vs. N.Palanisamy].*** The relevant paragraphs reads as under:

> "19. We may add a word of caution. The power under Section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should

ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs.

20. If the application is allowed and the evidence is permitted and ultimately the court finds that evidence was not genuine or relevant and did not warrant the reopening of the case recalling the witnesses, it can be made a ground for awarding exemplary costs apart from ordering prosecution if it involves fabrication of evidence. If the party had an opportunity to produce such evidence earlier but did not do so or if the evidence already led is clear and unambiguous, or if it comes to the conclusion that the object of the application is merely to protract the proceedings, the court should reject the application. If the evidence sought to be produced is an electronic record, the court may also listen to the recording before granting or rejecting the application.

21. Ideally, the recording of evidence should be continuous, followed by arguments, without any gap. The Courts should constantly endeavour to follow such a time schedule. The amended Code expects them to do so. If

> that is done, applications for adjournments, re-opening, recalling, or interim measures could be avoided. The more the period of pendency, the more the number of interlocutory applications which in turn add to the period of pendency."

7. As held by the Hon'ble Apex Court, if the trial court feels that, in the interest of justice and for the proper adjudication of the case, the application filed under Order 18 Rule 17 of the Code of Civil Procedure has to be allowed, the said decision cannot be interfered with.

8. No doubt, the power to recall any witness under Order 18 Rule 17 of the Code of Civil Procedure can be exercised by the Courts either on its own accord or on an application by any of the parties, but the power is discretionary and should be used sparingly in appropriate cases to enable the Court to clarify any doubts, it may have in regard to the evidence led by the parties. The said power of recalling should not be used for filling up the omissions or for further examination in chief or cross-examination or to place any material evidence, which could not be produced earlier.

9. In fact, in the very recent judgment of the Hon'ble Apex Court reported in ***(2016) 11 SCC 296 [Ram Rati vs*. *Mange Ram (Dead) through legal representatives and others],*** following its earlier judgments referred to supra, viz.,***(2013)14 SCC 1*** and ***(2011) 11 SCC 275,*** had categorically held as follows:

> "11. The respondent filed the application under Rule 17 read with Section 151 of the CPC invoking the inherent powers of the court to make orders for the ends of justice or to prevent abuse of the process of the court. The basic purpose of Rule 17 is to enable the court to clarify any position or doubt, and the court may, either suo motu or on the request of any party, recall any witness at any stage in that regard. This power can be exercised at any stage of the suit. No doubt, once the court recalls the witness for the purpose of any such clarification, the court may permit the parties to assist the court by examining the witness for the purpose of clarification required or permitted by the court. The power under Rule 17 cannot be stretched any further. The said power cannot be invoked to fill up omission in the evidence already led by a witness. It cannot also be used for the purpose of filling up a lacuna in the evidence. 'No prejudice is caused to either party' is also not a

> permissible ground to invoke Rule 17. No doubt, it is a discretionary power of the court but to be used only sparingly, and in case, the court decides to invoke the provision, it should also see that the trial is not unnecessarily protracted on that ground."

10. Order 18 Rule 17 of Code of Civil Procedure is primarily a provision enabling the Court to clarify any issue or doubt by recalling the witness.

11. In the case on hand, the suit itself is challenging the decree passed in O.S.No.5677 of 2008. The plaintiff is now only seeking to mark the paper publication effected in the said suit and the Bailiff's report in the form of certified copies. Therefore, when the learned Trial Judge has permitted the re-opening of the case by exercising its discretion, it has to be taken that the purpose of the same is only clarificatory in nature. Hence, the same cannot be faulted with.

12. In view of the same, I do not find any merit in the revision. Accordingly, the revision fails and the same is

dismissed. No costs. Consequently, the connected miscellaneous petition is closed.

23.02.2017

vj2

Index: yes/No
Internet: yes

To

The VI Assistant Judge, City Civil Court, Chennai

PUSHPA SATHYANARAYANA,J.,

vj2

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